

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS

4
5 IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
6 PHARMACY CASES LITIGATION)
7)
8)

9 BEFORE: THE HONORABLE RYA W. ZOBEL AND
10 THE HONORABLE JENNIFER C. BOAL

11
12 **MOTION HEARING**
13 **AND**
14 **STATUS CONFERENCE**

15
16 John Joseph Moakley United States Courthouse
17 Courtroom No. 12
18 One Courthouse Way
19 Boston, MA 02210

20 October 14, 2015
21 2:00 p.m.

22 Catherine A. Handel, RPR-CM, CRR
23 Official Court Reporter
24 John Joseph Moakley United States Courthouse
25 One Courthouse Way, Room 5205
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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, and the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on October 14, 2015.)

THE COURT: Good afternoon. Please be seated.

We seem to be stymied at the moment because the telephone system isn't working. So, we need to wait until the technical people can come and help us, particularly for the Virginia argument.

(Pause.)

THE COURT: Does anyone know whether there are counsel who are interested in the New Hampshire cases who would want to listen to the argument with respect to them?

MR. LEE: Yes, your Honor.

MR. SMART: Yes, your Honor. Myself, Bill Smart.

THE COURT: I know. Other than people who are here.

MR. SMART: Oh, I'm sorry. Yes, there is another attorney from my firm who would be listening in.

MR. LEE: And I believe there's a plaintiff's attorney as well --

THE COURT: I'm sorry?

MR. LEE: I believe there's a plaintiff's attorney as

1 well for Golden who is listening in, Attorney John Lyons.

2 THE COURT: Okay.

3 (Discussion off the record at the Bench.)

4 (Pause.)

5 THE COURT: We are desperate for your presence.

6 (Discussion off the record.)

7 THE COURT: All right. We can now start the status
8 conference. This is Judge Zobel for those on the telephone.
9 I hope all 40 of you are now available. I'm sorry, we had
10 problems with the system.

11 In any event, it was -- the agenda asks that we first
12 deal with two motions, one the Virginia motion to approve a
13 settlement -- or several settlements, I think. Yes, I think
14 several -- no, wait a minute. Only one.

15 MR. STRANCH: Your Honor, I believe the gentleman
16 that filed that was on the phone and got off the phone to call
17 separately so that he could appear to handle that. Ms.
18 Johnson has stepped out to call him and to ask him to return
19 back into the conference.

20 THE COURT: Who is the person we're looking for in
21 Virginia?

22 MS. JOHNSON: Mr. Laymon, your Honor. I just stepped
23 out to let him know that we are using the conference call
24 number after all.

25 THE COURT: Mr. Laymon, are you there?

1 (No response.)

2 THE COURT: Not there. He is calling in or
3 connecting himself?

4 MS. JOHNSON: Yes, but it may take a minute, your
5 Honor. He was waiting for a call, but now he's dialing in.

6 (Pause.)

7 MS. JOHNSON: Perhaps it makes sense, your Honor, to
8 start with the New Hampshire motions that are set for oral
9 argument. I don't believe Mr. Laymon has an interest in
10 those.

11 THE COURT: He does?

12 MS. JOHNSON: I do not believe that he has an
13 interest in those, no.

14 THE COURT: So, you're suggesting we should start
15 with them?

16 MS. JOHNSON: Yes, your Honor.

17 THE COURT: He'll have to listen for a while.

18 MS. JOHNSON: That is true.

19 THE COURT: Mr. Laymon, are you there yet?

20 MR. LAYMON: I am here. Can you hear me?

21 THE COURT: Yes. What is before us now is your
22 motion for -- or petition for approval of the compromised
23 settlement in a wrongful death claim, and I think that what
24 we're doing is a formality. So, treating it as a formality, I
25 will hear you on that formality.

1 MR. LAYMON: Thank you, your Honor. I do believe
2 this is a formality.

3 I introduce myself. I am Garren Laymon representing
4 Leona Corker, who is the executrix of the estate of Billy L.
5 Corker.

6 As you notice, this is a formality. It comes from a
7 Virginia statute, Section 8.01-55 that requires court approval
8 of wrongful death settlements, even if no lawsuit has been
9 filed, and that's the situation we are in here.

10 Mr. Corker died after receiving tainted MPA
11 injections. No lawsuit has been filed, but the statute of
12 limitations, we assert that hasn't expired yet.

13 So, it appears that Ms. Corker is allowed to
14 participate in the procedures negotiated with the other
15 Virginia plaintiffs, but what she's doing through those
16 procedures potentially amounts to settling a wrongful death
17 claim, which requires court approval.

18 So, with respect to Ms. Corker, her husband received
19 two MPA injections at the Insight Imaging Clinic about a month
20 apart. From the records obtained from Insight, it appears
21 that both injections were from tainted MPA vials produced by
22 NECC.

23 Mr. Corker developed an infection at the injection
24 site. He exhibited symptoms consistent with the effects of
25 tainted preservative-free MPA compounded by NECC. His health

1 never recovered and he died on July 12th, 2014. The
2 petitioner believes that Mr. Corker died as a result from one
3 or both injections.

4 Mrs. Corker now seeks an order authorizing her to
5 participate in the Insight claims resolution procedures to
6 settle the wrongful death claim, and that's why we're here
7 before the Court, your Honor.

8 THE COURT: Is there any objection?

9 (No response.)

10 THE COURT: All right. I have signed the order. So,
11 you're all set. Thank you.

12 MR. LAYMON: Thank you very much, your Honor.

13 THE COURT: Now, we turn to New Hampshire, and I
14 would like to know before we hear arguments, who is going to
15 argue. For the plaintiff?

16 MS. JOHNSON: For the plaintiffs, your Honor, it will
17 be Andrew Lee.

18 MR LYONS: And, Judge, Attorney Lyons is also on the
19 line. I represent Lecia Golden, but our motions were simply
20 to join the very fine pleadings filed by Kim. So, unless the
21 Court has some specific issue, I will likely not say anything.

22 THE COURT: Okay. And for the defendant?

23 MR. SMART: William Smart, your Honor.

24 THE COURT: I'm sorry?

25 MR. SMART: William Smart.

1 THE COURT: Mark?

2 MR. SMART: Smart, S-m-a-r-t.

3 THE COURT: Okay. I'm not exactly sure. I guess
4 maybe the defendant should argue first since the defendant has
5 the motion.

6 MR. SMART: That's what I had in mind, absolutely.

7 THE COURT: Okay. Go ahead.

8 MR. SMART: Thank you.

9 THE COURT: Try to do this in about ten minutes.

10 MR. SMART: Okay. Well --

11 THE COURT: Yes, we'll need the microphone. In fact,
12 if you want, you can just do it from your table and sit down
13 because otherwise -- the microphones don't have a very long
14 neck.

15 MR. SMART: Sure.

16 Well, your Honor, we're here today on motions to
17 dismiss that have been filed in three -- in fact, four cases
18 that were initially filed in the federal district court in New
19 Hampshire and were then transferred to this Court for
20 participation in the MDL. We feel that the Court lacks
21 subject matter jurisdiction over these cases.

22 We start with the proposition that these cases were
23 clearly filed after the confirmation of NECC's bankruptcy plan
24 on May 20th, and that, in general, the scope of bankruptcy
25 court jurisdiction under §1334(b) is going to be narrowed

1 following confirmation of that plan.

2 These cases should be dismissed because exercising
3 jurisdiction over them would not be consistent with *In Re:*
4 *Boston Regional Medical Center, In Re: Resorts*, or many of the
5 cases cited therein.

6 THE COURT: Well, why should they be dismissed? I
7 mean, it seems to me, at the very least, they should go back
8 to New Hampshire and be treated as New Hampshire cases or is
9 there no jurisdiction in New Hampshire either?

10 MR. SMART: There is no basis for jurisdiction other
11 than §1334(b).

12 I would point out, though, that of these four cases,
13 two of them have been filed in New Hampshire state court, two
14 recently, at least one since the Court raised the issue of its
15 own jurisdiction. We also have 22 cases which are proceeding
16 in state court. Of the -- two of the four who have not filed
17 in state court yet, they've apparently chosen not to do so,
18 presumably because there is a one-year saving statute in New
19 Hampshire that would likely apply. So, if this case is
20 dismissed not on the merits of the case, they would presumably
21 have another year to file suit.

22 So, we don't see the statute of limitations being a
23 significant issue here. Were the Court to dismiss these
24 cases, as we feel it should, those that have been filed in the
25 state will proceed. Those that have not will, presumably, be

1 filed in the near future.

2 In our view, you have really a commonality among
3 cases post confirmation that usually arise when you have the
4 litigation trust or the debtor in bankruptcy basically filing
5 a collections action for the purpose of accumulating funds to
6 be dispersed to the former claimants of the reorganized
7 debtor, which are then the trust beneficiaries.

8 THE COURT: Is the basis of your argument that there
9 is no longer an estate?

10 MR. SMART: That's one of the bases for the argument,
11 but I think -- well, maybe I'll just jump right to it.

12 The Court has articulated a potential basis for
13 related-to jurisdiction in a recent order and that's based on
14 the rolling over of expense funds.

15 THE COURT: Now, why does that not apply here?

16 MR. SMART: The nexus just isn't close enough, your
17 Honor.

18 THE COURT: Because these were filed after
19 confirmation or they vested after confirmation?

20 MR. SMART: Partly, yes, but, also, you know, if you
21 compare those cases, you have -- first of all, the idea that
22 this money is going to spill over and fund the trust is
23 speculative, I would suggest, because nobody knows how much,
24 if anything, is going to move into the trust, whether these
25 cases are litigated as part of the MDL or whether they're sent

1 back to state court. Nobody knows that. So, it's
2 speculative.

3 I would also argue that you have cases where a
4 litigation trust is a party and they're seeking a direct --
5 you know, they have a direct claim against some third party in
6 order to fund the trust, and the courts are finding that in
7 often cases, that's not a direct and close enough nexus.

8 This case is even more removed. The plan in this
9 case specifically carved out the claims of these plaintiffs
10 against other entities, like Pain Care and the clinics who are
11 not part of the bankruptcy, and it was contemplated that those
12 cases were going to go forward. There's a separate pool of
13 liability and potentially a recovery for those plaintiffs.

14 And so, the connection between those cases and the
15 tort trusts, let alone the bankruptcy, is so thin. You're
16 talking about this possibility that they could be litigated
17 more efficiently here and that maybe there would be more
18 expenses left over that we roll over. We don't know how much
19 that is. So, it's an extraordinarily thin connection between
20 these cases as they're postured now and this bankruptcy, and
21 it would be, I think, unprecedented based on any of the cases
22 I've looked at.

23 THE COURT: Does the multidistrict panel have
24 anything to say about jurisdiction?

25 MR. SMART: Does the multidistrict panel have

1 anything to say -- no. I mean, I think that jurisdiction is
2 derived from the federal statute and it is -- the onus is on
3 the Court.

4 THE COURT: So, what I'm really deciding is that
5 there's no jurisdiction in New Hampshire?

6 MR. SMART: Not in New Hampshire Federal District
7 Court, no.

8 THE COURT: Yes. Well, that's what we're talking
9 about.

10 MR. SMART: Right.

11 THE COURT: The four cases before me were all filed
12 in federal court, right?

13 MR. SMART: That's right. Right, they're all filed
14 in federal court.

15 So, you know, really -- and just to put this into a
16 test that the Court can apply, if you look at the *In Re: Haas*
17 case, which is a case that's discussed at some length in *In*
18 *Re: Resorts*, essentially, what you have there is you have a
19 liquidation trust created by a bankruptcy suing a former
20 partner of the bankrupt entity to recover money for the trust.
21 Presumably, that partner had something to do with the
22 financial difficulties that brought that company to bankruptcy
23 in the first place.

24 And what the Court concluded was that there was no
25 jurisdiction because the plaintiff had failed to demonstrate

1 how any damages recovered from the defendant in that case,
2 quote, "were necessary to effectuate the terms of the plan."
3 And what you end up with is the ruling *In Re: Resorts*, that
4 the potential to increase assets in the litigation trust alone
5 is not a sufficient basis to confer related-to jurisdiction
6 for cases post confirmation.

7 THE COURT: We're not talking about that in this
8 context, in any event. We're not adding to the litigation
9 trust.

10 MR. SMART: Well, my understanding of at least one
11 theory of relatedness that's been articulated is that the
12 rollover from the expense fund could potentially increase it.

13 So, in comparison -- so, it's very thin. So, I think
14 the test really would have to be, you know, is the rollover
15 excess expense funds necessary to effectuate the terms of the
16 plan in this case? And I think the answer to that is clearly
17 no. Whether there's no dollars or a million dollars that
18 rolls over, it doesn't affect this plan unfolding as written.
19 The Court is not being called upon to interpret any aspect of
20 the plan. And so, it's clear -- it's just purely an issue of
21 how much money is in the trust, and it's very speculative at
22 that and it's very removed compared to these cases where the
23 trust itself is actually filing a collections action.

24 Even if the Court finds that it has jurisdiction or
25 that it may have jurisdiction, we've asked the Court to

1 abstain. We've asked the Court to carve out these cases and
2 send them back.

3 THE COURT: That's not going to get you anywhere. If
4 there is jurisdiction, I think I would let it go forward. I
5 don't think I would voluntarily abstain, but I'll hear you.

6 MR. SMART: Okay.

7 (Laughter.)

8 MR. SMART: What I've noted, looking back to some of
9 the Court's rulings, it doesn't appear -- and it's sort of
10 consistent with what your Honor has just said -- that there
11 hasn't been a real detailed analysis of the abstention issue.
12 It seems to turn on, well -- at least initially, there was
13 abstention because the basis for jurisdiction seemed weak.
14 Then those cases were taken into the MDL.

15 So, the weakness in the jurisdictional argument that
16 I've just articulated, based on the rolling over of expense
17 funds, is so tenuous, so much more tenuous than in any other
18 reported case, that even if there is jurisdiction, there needs
19 to be abstention.

20 These are state law claims against entities of New
21 Hampshire, who treated patients in New Hampshire. They want
22 the opportunity to try these cases, if necessary, to a New
23 Hampshire jury and, again, there is no statute of limitations
24 issue in the case.

25 THE COURT: Thank you. Mr. Lee.

1 MR. LEE: Andrew Lee for plaintiffs Jojayra Garcia
2 and Cheryl Ann --

3 THE COURT: Is that on?

4 MR. LEE: Oh, I got it.

5 THE COURT: Thank you.

6 MR. LEE: Andrew Lee for the plaintiffs Jojayra
7 Garcia and Cheryl Ann McCarthy.

8 Your Honor, I'm going to be working a little bit
9 backwards from counsel and explaining why jurisdiction is,
10 first, appropriate and not address the timing issue until
11 after.

12 Many of the issues raised in the defendants' motion
13 to dismiss have already been resolved by the Court's recent
14 order related to the Tennessee defendants as well as the
15 jurisdiction issue as well as whether or not the Court has the
16 ability to hear -- or to set trial for the Tennessee defendant
17 cases.

18 THE COURT: What is the basis for jurisdiction here?

19 MR. LEE: The basis for jurisdiction is related-to
20 jurisdiction under §1334.

21 THE COURT: How are the New Hampshire plaintiffs --
22 how do they have a case related to the bankruptcy?

23 MR. LEE: Your Honor, they have a case related to
24 bankruptcy the same way that multiple cases that have been
25 filed prior to the confirmation date do, and the reason that

1 is --

2 THE COURT: Does it matter that the case was filed
3 after confirmation?

4 MR. LEE: It does not, your Honor.

5 THE COURT: Why not?

6 MR. LEE: The reason it does not matter is because,
7 as defendants have just said, they're basing their belief that
8 the Court does not have related-to jurisdiction over these
9 cases is because they were filed after confirmation, because
10 the NECC bankruptcy stay no longer existed. Plaintiffs assert
11 that's simply incorrect.

12 THE COURT: Why?

13 MR. LEE: If we look at *In re: Resort*, which was
14 cited by defendants -- I believe defendants quote this
15 particular passage: "It is impossible for the bankrupt
16 debtor's estate to be affected by post confirmation dispute
17 because the debtor's estate ceases to exist once confirmation
18 has occurred."

19 However, we believe that statement is taken out of
20 context. If you look at the immediately-following sentence,
21 the Court *In Re: Resorts* cites 11 U.S.C. 1141(b) and
22 continues, "Unless otherwise provided by the plan or order
23 confirming the plan, the confirmation of the plan vests all of
24 the property of the estate into the reorganized debtor."

25 Your Honor, what that basically means is under

1 §1141(b), generally, confirmation of the plan vests all of the
2 -- all of the estate assets into the reorganized debtor.
3 However, there is an exception, and that exception is
4 highlighted in a case cited by the defendants -- I'm sorry --
5 by the plaintiffs in response to the defendants' reply to the
6 show cause order, *In Re: Roll Call*, and in that court -- I'm
7 sorry. In that case, the court highlights the fact that there
8 is that exception that states that the bankruptcy plan itself
9 can provide for a different date that estate assets vest in
10 the reorganized debtor rather than confirmation date.

11 For example, in *In Re: Roll Call*, the plan itself had
12 a provision that stated, "Upon the effective date, pursuant to
13 Section 1141(b) and (c) all property of the estate of the
14 debtor shall vest in the reorganized debtor free and clear of
15 all claims."

16 THE COURT: Is there such a provision in the NECC
17 plan?

18 MR. LEE: Yes, your Honor. Section 10.1 actually
19 states, "All property of the NECC bankruptcy estate does not
20 vest in post effective debtor until the effective date."

21 So, because of that, the estate continued to exist
22 until the effective date, which occurred after the filing of
23 the plaintiffs' complaints.

24 THE COURT: Okay. That's your argument?

25 MR. LEE: Yes.

1 MR. SMART: Your Honor, that's an argument that we
2 addressed at length in our briefing. This is a form-over-
3 substance argument.

4 We had -- in this case the plan was confirmed on May
5 20th. If everything unfolded as expected over 14 days, it
6 became effective. These cases were filed perhaps hours before
7 the effective date of the plan. And so, there's just no
8 meaningful distinction between plan confirmation and plan
9 effective date in this context.

10 THE COURT: Well, why not? I mean, if, in fact, the
11 plan itself says it is effective on another date other than
12 the date of the signing or whatever happened, why shouldn't
13 that be given credit?

14 MR. SMART: Because by the point that these cases are
15 filed within hours of that effective date, it's a foregone
16 conclusion, number one; and, number two, it's really at the
17 point where an approved plan is approved, that the situation
18 fundamentally changes and the Court's focus shifts to post
19 confirmation issues. And the question becomes, how does this
20 case relate to post confirmation issues?

21 So, the question is, how does this New Hampshire --
22 how do these New Hampshire cases affect the interpretation,
23 implementation, consummation, execution or administration of a
24 confirmed plan or incorporated litigation trust agreement?
25 And the only basis I've heard articulated is this, well, it's

1 possible that some expense funds could roll over. We don't
2 know how much, but it's possible. And to me that's not the
3 close nexus that is called for in *In Re: Resorts*.

4 THE COURT: Okay. Anything else, Mr. Lee?

5 MR. LEE: Yes, your Honor.

6 We are asking -- or arguing that any sort of post
7 confirmation -- and I'm using that term in light of what was
8 written in *In Re: Resorts*, although we claim that confirmation
9 is not the date that any sort of related-to subject matter
10 jurisdiction changes or shrinks.

11 We are looking at the jurisdiction over our cases in
12 the context of whether it has any -- or it's possible that it
13 could affect the bankruptcy estate because the bankrupt estate
14 exists at the time. This post confirmation evaluation, this
15 new analysis doesn't even play into our argument.

16 THE COURT: So, you're saying what with respect to
17 the confirmation date?

18 MR. LEE: That the confirmation date is irrelevant as
19 far as the jurisdiction of this Court under §1334.

20 THE COURT: So, when does the jurisdiction of this
21 Court cease under this theory of relatedness?

22 MR. LEE: Under the effective date, which was
23 provided by the plan itself.

24 THE COURT: Because it was provided in the plan?

25 MR. LEE: Yes, ma'am.

1 THE COURT: And only that?

2 MR. LEE: Yes.

3 THE COURT: Okay.

4 I mean, you say otherwise and he says --

5 MR. SMART: Well, I do. I mean, I don't understand
6 how if the basis is -- if there's a genuine connection,
7 substantive connection between this litigation and the trust
8 based on the rolling over of expenses, that's not affected by
9 the -- by the effective date. So, there's an inconsistency
10 within the argument that's not logical.

11 THE COURT: Well, if there's a case that says the
12 effective date is the one -- it's either confirmation or if
13 there's another date, the other date, if there is such law,
14 then why should I not go along with it?

15 MR. SMART: I suppose if there is such law. The only
16 law I've seen is this *Global Crossings* case where there's just
17 an extended -- and we've dealt with this in the brief.
18 There's an extended period between confirmation and
19 effectiveness and it was a unique situation.

20 THE COURT: So is this.

21 MR. SMART: True. Very true.

22 THE COURT: All right. I will take the papers and I
23 thank you both.

24 MR. SMART: Thank you.

25 MR. LEE: Thank you, your Honor.

1 THE COURT: Now we go back to the agenda. Is that
2 you, Ms. Johnson?

3 MS. JOHNSON: It is, your Honor. Thank you.

4 In terms of status of the bankruptcy, I don't think
5 we need a formal report on that, unless Mr. Gottfried feels
6 otherwise.

7 MR. GOTTFRIED: Just to share briefly with the Court,
8 the post confirmation officer is actively engaged in preparing
9 to vacate the premises in Framingham.

10 THE COURT: That's still going on?

11 MR. GOTTFRIED: It's still going on. It's been a
12 very lengthy process. We're hoping to conclude it shortly,
13 to, hopefully, sell the salable equipment and furniture and
14 vacate the premises, but that is ongoing. It's been ongoing
15 in a fairly intense way over the last several weeks.

16 In addition to that, the post confirmation officer
17 continues to deal with late claim motions that are being filed
18 in the bankruptcy, dealing with the claims that are filed and,
19 basically, is fully engaged in the analysis of those claims.
20 So, the work continues.

21 THE COURT: Thank you.

22 MAGISTRATE JUDGE BOAL: I just had a question. I
23 don't know if it's more directed to the PSC or Mr. Gottfried,
24 really, from Judge Neiman who is anxious to be at work when
25 it's appropriate to do so. Do you have any sort of timeframe

1 when you think that his services will be potentially required?

2 MS. JOHNSON: Mr. Ellis will address that, your
3 Honor.

4 MR. ELLIS: Your Honor, I think the first appeals, if
5 there are any, would probably be in, hopefully, 60 to 90 days.

6 MAGISTRATE JUDGE BOAL: And those would be appeals to
7 Judge Neiman?

8 MR. ELLIS: Correct, from the settlement
9 administrator's determination.

10 MAGISTRATE JUDGE BOAL: Thank you.

11 THE COURT: Well, has the beginning date been fixed
12 for the 30 to 90 days?

13 MR. ELLIS: The claims deadline has now passed.

14 THE COURT: So, now we're beginning to count?

15 MR. ELLIS: That's correct, that's where we are. And
16 we hope to have the first letters out between 60 to 90 days,
17 which would then trigger -- it, actually, may be another 30
18 days there because there's one more set. So --

19 THE COURT: So, sometime next summer?

20 (Laughter.)

21 MR. ELLIS: Late fall, early spring.

22 MAGISTRATE JUDGE BOAL: Thank you.

23 MS. JOHNSON: I will suggest, your Honor, that the
24 claims administrator reach out to Judge Neiman to provide him
25 directly with some observations.

1 MAGISTRATE JUDGE BOAL: Yes, definitely.

2 MS. JOHNSON: That brings us to the status of the
3 insurance declaratory judgment actions. Mr. Gottfried will
4 address where we are with the Ironshore action.

5 MR. GOTTFRIED: Yes, your Honor.

6 I'm pleased to report that subject to working through
7 the documentation of the settlement, that the post
8 confirmation officer has reached a settlement with Ironshore.

9 THE COURT: Fabulous.

10 MS. JOHNSON: That brings us to the declaratory
11 judgment action with Specialty Surgery Center that's ongoing
12 in Tennessee, and Mr. Gastel will address that.

13 MR. GASTEL: Good afternoon, your Honor.

14 The Middle District of Tennessee has agreed that the
15 merits of the plaintiffs' claims are at issue in the dec
16 action, and in light of that and this Court's order of October
17 7th, the individual tort victim defendants in that case, the
18 plaintiffs here, anticipate requesting the JPML transfer that
19 case to this Court. We hope to have those papers filed in the
20 coming days and we would anticipate a ruling from the JPML on
21 that within 30 to 45 days.

22 THE COURT: Why is it coming here?

23 MR. GASTEL: Again, in light of this Court's decision
24 to set venue for the initial Bellwether trials, we presume, of
25 some Tennessee cases here in this Court, we believe that there

1 needs to be consistency between all actions that involve the
2 merits of the plaintiffs' claims there -- I'm sorry -- the
3 plaintiffs' claims that are pending here.

4 THE COURT: But what does that have to do with the
5 coverage case?

6 MR. GASTEL: Well, in the coverage case, if you
7 recall, your Honor, and as I mentioned at the last two status
8 conferences, the insurance company has put into issue the
9 legal merits of some of the claims that the plaintiffs have
10 raised here.

11 THE COURT: Okay.

12 MR. GASTEL: And so, we believe that there needs to
13 be consistency between the rulings on plaintiffs' claims and
14 that's the whole purpose of the MDL, is to sort of streamline
15 and give consistency to those types of matters and as a
16 result, we believe the JPML should transfer them here.

17 THE COURT: And who is applying for transfer, which
18 party?

19 MR. GASTEL: It will be the plaintiffs -- the
20 Specialty Surgery plaintiffs who have cases pending in this
21 Court right now.

22 THE COURT: Well, they're seeking to have the
23 coverage case come here as well?

24 MR. GASTEL: Correct, your Honor. And they happen to
25 be the defendants in the dec action.

1 THE COURT: Okay. Well, we'll wait and see.

2 MR. GASTEL: And that's, I think, what we're asking
3 the Court to do.

4 THE COURT: Is this request to the multidistrict
5 panel a request by all parties or only some?

6 MR. GASTEL: We haven't conferred with the insurance
7 company or counsel for Specialty Surgery on that yet, but we
8 anticipate that there will be probably some adversary type of
9 motions filed at the JPML.

10 THE COURT: So, it would be useful to have this on
11 the agenda for the next meeting, too?

12 MR. GASTEL: Most likely, your Honor, yes.

13 THE COURT: Thank you.

14 Okay. Status of discovery -- no -- yes. That's it.

15 MS. JOHNSON: Yes.

16 THE COURT: And that's Judge Boal.

17 MS. JOHNSON: That is Judge Boal, with one issue we
18 would like to bring to the Court's attention.

19 I'll acknowledge, first, that Judge Boal held a
20 hearing this morning that dealt with virtually all, if not
21 every single one, of the pending discovery motions.

22 There is one order that was entered since the last
23 status conference that is -- sort of blends discovery and
24 litigation, and we wanted to address that. That's, of course,
25 this Court's order on the Bellwether trials related to the

1 National Healthcare Center, and Mr. Stranch wanted to address
2 where we go now that we have that order.

3 THE COURT: Mr. Stranch.

4 MR. STRANCH: Thank you, your Honor. And good
5 afternoon.

6 After receiving the Court's order, we have pending
7 before the Court an assented-to motion that would change --
8 before we received your order, we assented with the defendants
9 to extend the deadlines that are currently in place for
10 disclosures -- expert disclosures and discovery about 30 days.

11 THE COURT: Didn't Judge Boal deal with that already?

12 MR. STRANCH: No.

13 MAGISTRATE JUDGE BOAL: I'm planning to issue
14 something. I don't know if you want to add anything or --

15 MR. STRANCH: Well, the one thing I will say is our
16 expert reports are due this Friday and we are under an
17 incredible time crunch because of that and not all --

18 MAGISTRATE JUDGE BOAL: I am planning to extend the
19 deadline. So, you don't need to produce those this Friday.

20 MR. STRANCH: Great. Thank you, your Honor.

21 THE COURT: That's it?

22 MR. STRANCH: And the other thing that I was going to
23 raise with the Court is the Bellwether schedule that the Court
24 has put in its order is not a fully flushed-out schedule.
25 There's still some deadlines that need to be filled in, and we

1 are going to propose, since we want to keep that early spring
2 trial date that the Court has said the Court is aiming for, we
3 propose that we meet and confer with the defendants and fully
4 flush out the rest of that Bellwether process and those
5 deadlines and get something --

6 THE COURT: We would both welcome that.

7 MR. STRANCH: Okay. Good. We'll do that and we'll
8 get it to the Court by Monday, and we will do a three-page
9 motion in support if we're unable to agree on everything, just
10 explaining the differences. Hopefully, we can agree on
11 everything and fill it in.

12 THE COURT: If you agree, then you can have more
13 pages.

14 (Laughter.)

15 MR. STRANCH: We can have as many pages as we want if
16 we're in agreement?

17 MAGISTRATE JUDGE BOAL: And just so we're not sort of
18 two ships passing in the night, I was planning to issue an
19 order in response to Docket Nos. 2245 and 2251, and these deal
20 with common discovery deadlines.

21 MR. STRANCH: Right.

22 MAGISTRATE JUDGE BOAL: And you're going to be giving
23 us a proposal with respect to the Bellwether trials?

24 MR. STRANCH: To the Bellwether and case-specific
25 deadlines.

1 MS. PUIG: Your Honor, if I could be heard.

2 MAGISTRATE JUDGE BOAL: Yes.

3 MS. PUIG: Yvonne Puig on behalf of Saint Thomas
4 Entities.

5 Responsive to Mr. Stranch's question --

6 THE COURT: Excuse me. There is a chair there for
7 you --

8 MS. PUIG: Thank you.

9 THE COURT: -- and a microphone.

10 MS. PUIG: Thank you, your Honor. Yvonne Puig on
11 behalf of Saint Thomas Entities.

12 One follow-on question to Mr. Stranch's point. As
13 well, he cites the deadline for identification of experts for
14 the PSC.

15 A literal reading of the Court's order from October
16 7th would have the case-specific discovery closed by October
17 30th, which means all the plaintiffs -- or proposed plaintiffs
18 in the Bellwether would need to be deposed in the next two
19 weeks. So, I would ask Judge Boal and you, Judge Zobel, will
20 that be extended as well?

21 MAGISTRATE JUDGE BOAL: If I may. I was planning to
22 issue an order with respect to the common discovery deadlines.
23 I did notice that there's --

24 MS. PUIG: There's an overlap.

25 MAGISTRATE JUDGE BOAL: Yes. The way the orders have

1 come down, there is overlap. So, I think it makes sense to
2 deal with -- if Judge Zobel agrees, with those specific
3 deadlines.

4 THE COURT: I agree to anything you say.

5 MAGISTRATE JUDGE BOAL: I should wait and hear the
6 proposals.

7 MS. PUIG: Okay. Thank you.

8 MAGISTRATE JUDGE BOAL: But that deadline is not
9 current.

10 MS. PUIG: Thank you both. I just wanted to be sure.
11 Thank you.

12 MR. STRANCH: We'll discuss that with Tennessee
13 defendants.

14 MR. CHALOS: Your Honor, Mark Chalos on behalf of the
15 plaintiffs.

16 This is particularly an issue of concern to me
17 because I'm dealing with some of the experts that we would
18 otherwise be disclosing on Friday.

19 When your Honor issues your order, will we have
20 sufficient time to -- I mean, in other words, the order is not
21 going to come to down and say you're producing tomorrow or a
22 few days from now?

23 THE COURT: You'll have sufficient time as she's
24 defined "sufficient."

25 MR. CHALOS: Good question. Right.

1 But I just want to be mindful. If we're going to
2 head off for Friday, that we, you know --

3 MAGISTRATE JUDGE BOAL: It's not going to be Monday.

4 MR. CHALOS: Okay. That's great. Thank you, your
5 Honor.

6 THE COURT: Ms. Johnson.

7 MS. JOHNSON: I believe that covers No. 7(a) as well.
8 That was the assented-to motion to extend deadlines.

9 So, that brings us to 7(b), which is the PSC's
10 proposed qualified protective order for the production of
11 information from the Maryland Department of Health and Ms.
12 Meeder will address that briefly.

13 MS. MEEDER: Good afternoon, your Honor. Jessica
14 Meeder on behalf of the plaintiffs.

15 We have filed an amended proposed qualified
16 protective order to request -- or obtain a certain list the
17 Department of Health and Mental Hygiene Maryland has in its
18 possession. The docket number for that amended motion is
19 2323, and the department has consented to that production once
20 this order is put in place.

21 There may potentially be another list in their
22 possession that we would need to discuss with them separately.
23 So, there may also be another request by the PSC for the
24 production of that list, but at this point we're just
25 requesting what's stated in 2323.

1 MAGISTRATE JUDGE BOAL: That's for me.

2 MS. MEEDER: Okay. I have a copy of the motion, your
3 Honor, if that would be helpful.

4 MAGISTRATE JUDGE BOAL: Yes, that would be great.

5 MS. MEEDER: May I approach?

6 MAGISTRATE JUDGE BOAL: Yes. Thank you.

7 (Attorney Meeder hands document to the Court.)

8 THE COURT: Is that it?

9 (No response.)

10 THE COURT: Now the pro se liaison.

11 MS. JOHNSON: On to pro se liaison, which is Ms.
12 Martin.

13 MS. MARTIN: Good afternoon, your Honor.

14 Short update. We had some inquiries asking questions
15 about claim forms leading up to the deadline for claim forms
16 to be submitted, and since then we have not had any pro se
17 contacts. So, that seems to be wrapping up in terms of
18 questions about the claims.

19 Judge Boroff -- in a hearing earlier this month, the
20 bankruptcy court did allow one late pro se claimant. And so,
21 that was decided in that hearing, and I believe he's allowed
22 some other late claimants prior to that.

23 THE COURT: You know, it just occurred to me. When I
24 went senior, I had a right to decide what cases I did not wish
25 to hear and I had eliminated from my docket all pro se's. So,

1 what do I do?

2 MS. JOHNSON: Shall we ask Ms. Martin to leave the
3 courtroom?

4 (Laughter.)

5 THE COURT: All right.

6 MS. JOHNSON: That brings us to No. 9, the status of
7 appeal. We're pleased to report to the Court that the order
8 dismissing and the mandate have issued on the appeal. And so,
9 that appeal is no longer.

10 And on to schedule for future status conferences. We
11 have a conference --

12 THE COURT: We have that set for November 12th,
13 hadn't we?

14 MS. JOHNSON: Yes, your Honor, we have November 12th,
15 at 2:00, and December 17th, at 2:00, if those still work for
16 the Court. We would ask that we set the January conference as
17 well. I would suggest sometime the second week of January.

18 COURTROOM DEPUTY CLERK URSO: What about the 13th?

19 MS. JOHNSON: That works for the plaintiffs, your
20 Honor.

21 MR. KIRBY: Your Honor, Greg Kirby for Box Hill
22 Surgery Center.

23 I can't do that date, if that means anything.

24 THE COURT: Wait a minute. We're now talking about
25 November 12th?

1 MS. JOHNSON: January.

2 COURTROOM DEPUTY CLERK URSO: I thought you said
3 January.

4 THE COURT: November 12th is okay. December 17th is
5 okay. And the question is January what?

6 COURTROOM DEPUTY CLERK URSO: Well, I was looking at
7 January 13th, but the gentleman in the back said that isn't a
8 good date.

9 THE COURT: You can't do it by telephone either?

10 MR. KIRBY: No. I have an all-day commitment.

11 THE COURT: So, we are going to have another date?

12 COURTROOM DEPUTY CLERK URSO: Maybe the 14th, and I
13 can switch the hearings off on the 14th.

14 MR. KIRBY: The 14th would be great.

15 THE COURT: Is the 14th a problem?

16 MR. KIRBY: The 14th is great.

17 MS. JOHNSON: The 14th works for the plaintiffs.

18 THE COURT: All right. January 14th.

19 MAGISTRATE JUDGE BOAL: I would just add that I have
20 scheduled a jury trial this week, which doesn't affect the
21 afternoon proceedings, but if we need to have any discovery
22 disputes, I'll have to do it the afternoon before. So, that
23 would be the 13th. Or I could do it the afternoon of the next
24 day, the Friday.

25 THE COURT: I'm sorry. You are Mr.?

1 MR. KIRBY: Mr. Kirby, Greg Kirby from Box Hill
2 Surgery Center.

3 The 14th and the 15th would be great if you had to do
4 the discovery the next day.

5 THE COURT: We try to please everyone.

6 MS. JOHNSON: That works for the plaintiffs, your
7 Honor.

8 COURTROOM DEPUTY CLERK URSO: So, the 14th, at 2
9 o'clock. Then we would do the 15th, at 11:00?

10 MAGISTRATE JUDGE BOAL: At 2:00.

11 COURTROOM DEPUTY CLERK URSO: Oh, at 2:00?

12 THE COURT: Because she's in trial.

13 COURTROOM DEPUTY CLERK URSO: Right. I'm sorry.
14 I'll type Steve.

15 THE COURT: Now, unopposed motions.

16 MS. JOHNSON: Yes, your Honor. There are a number of
17 unopposed motions here. These are all fully briefed and
18 pending before your Honor.

19 THE COURT: Then I can allow them?

20 MS. JOHNSON: We would request that you do, yes.

21 THE COURT: I mean, since they're unopposed.

22 MS. JOHNSON: Correct. And all have been filed and
23 the time to respond has well elapsed.

24 THE COURT: I thought we had dealt before with No.
25 13, the 100 pallets of paper.

1 MS. JOHNSON: We may have, your Honor, and the
2 transcript from the last status conference to my reading was a
3 little bit unclear whether that was included.

4 THE COURT: Okay.

5 MS. JOHNSON: So, there may be overlap.

6 THE COURT: So, it's allowed, either the first time
7 or second time.

8 And then there are a bunch that are Judge Boal's.

9 MAGISTRATE JUDGE BOAL: Right. No. 14 will be
10 included in the order that I'm issuing for scheduling.

11 MS. JOHNSON: Thank you.

12 THE COURT: New Hampshire, I think, is not unopposed,
13 but it's what we heard earlier, is it not?

14 MS. JOHNSON: No. This is different, your Honor.
15 This is actually counsel in New Hampshire --

16 THE COURT: These are voluntary dismissals by certain
17 plaintiffs?

18 MS. JOHNSON: They are. They're styled a little
19 oddly, perhaps, but they are, essentially, voluntary
20 dismissals.

21 THE COURT: Okay. And Box Hill is stipulated?

22 MR. KIRBY: I'm sorry. What issue, your Honor?

23 THE COURT: No. 16 on the agenda, Box Hill
24 stipulation on extension of time to answer complaints.

25 MR. KIRBY: Yes. Yes, your Honor.

1 THE COURT: Okay. Done.

2 MR. KIRBY: And so the Court knows, we actually
3 agreed to a further extension until the 20th of October.

4 THE COURT: Okay. So long as it doesn't muck up our
5 schedule, that's fine.

6 MR. KIRBY: Thank you, your Honor.

7 MS. JOHNSON: That brings us to discovery-related
8 motions, and all of 17 through 22 were heard before Judge Boal
9 this morning.

10 THE COURT: Okay. Then Ohio Medical defendant's
11 motion to dismiss. That is -- I'm working on that. I have a
12 draft.

13 MS. JOHNSON: Thank you, your Honor.

14 THE COURT: Choice of law briefing --

15 MS. JOHNSON: Yes.

16 THE COURT: -- is also in draft.

17 MS. JOHNSON: Thank you.

18 That brings us to briefing in progress. The Finnegan
19 and Haynes joint motion was heard before Judge Boal this
20 morning, which brings us to the PSC's motion for partial
21 summary judgment on the product-liability claims against Saint
22 Thomas, and I believe Mr. Nolan wishes to be heard on that
23 briefly in light of the Court's recent order addressing Saint
24 Thomas.

25 MR. NOLAN: Your Honor, George Nolan from Nashville.

1 I just wanted to mention briefly that the plaintiffs
2 have filed a motion for partial summary judgment on a legal
3 issue that we think requires decision before these cases are
4 to be tried, and that issue is that we in that motion are
5 asking the Court to find that the Saint Thomas Outpatient
6 Neurosurgical Center meets the statutory definition of a
7 seller under the Tennessee Products Liability Act, and that as
8 such, under Tennessee law, is jointly and severally liable for
9 all harm caused by the product. In other words, as far as our
10 strict product-liability claim is concerned, that entity would
11 not be able to attribute fault to NECC or any other party
12 within the chain of distribution.

13 It's not fully briefed. It's not ripe. It's really
14 in the coming attractions category. We anticipate asking the
15 Court to entertain argument at the next status conference.

16 The reason I wanted to mention it is that we filed
17 that motion, your Honor, before we had the benefit of this
18 Court's ruling of last week on the trial venue issue, and in
19 that particular ruling, the Court indicated that we are --
20 will be governed by its order of July the 9th with regard to
21 deadlines, and so forth.

22 We talked about some of that today, but one sentence
23 in the Court's July 9th order says that, "The parties shall
24 seek leave of the Court to move for summary judgment," and I
25 just wanted to let the Court know, we were not in any way

1 intending to contravene that order when we filed this
2 particular motion for partial summary judgment, but now that
3 the Court has ruled on the venue issue and we see that phrase
4 in the July 9 order, I just wanted to let the Court know that
5 my family and I desperately hope that you don't find me in
6 contempt for filing that motion, but it's an issue that we
7 felt was important.

8 (Laughter.)

9 THE COURT: I'll think about it.

10 MR. NOLAN: Thank you.

11 THE COURT: Yes.

12 MR. TARDIO: Your Honor, Chris Tardio for the
13 Tennessee Clinic defendants.

14 We're on the other side of that motion, and Mr. Nolan
15 is right, that didn't seek leave, but, more importantly, it's
16 going to take more than 30 days to brief that motion. We
17 looked back -- this is, essentially, the same issue that was
18 briefed in the motions to dismiss, except now we have mounds
19 of fact discovery that's going to be signed into. We will
20 likely file a motion for partial summary judgment which will
21 result in cross-motions on the issue.

22 We agree with the plaintiffs on the motion to dismiss
23 to allow them almost -- more than two months, 70 something
24 days, to respond to our motion to dismiss. The briefing is
25 going to be equally as involved. So, we will file a formal

1 motion for extension of time to respond to that -- to the
2 motion for partial summary judgment, but it is not going to be
3 briefed by the next status conference, unless the Court orders
4 it.

5 THE COURT: No, we don't need to do that, do we?

6 MR. STRANCH: Your Honor, they've not approached us
7 about that. We're happy to discuss it with them and see if we
8 can work --

9 THE COURT: Yes. Why don't you agree on a date and
10 I'll abide by your agreement.

11 MR. STRANCH: We'll do that and we'll work with them.

12 MR. TARDIO: Your Honor, let me add one more point,
13 and it was mentioned earlier, but these two issues intersect
14 in some way.

15 The declaratory judgment action involving Specialty
16 Surgery Center that is now pending in the Middle District of
17 Tennessee -- and it sounds like the plaintiffs here,
18 defendants there, will be moving to transfer that case -- or
19 have that case transferred here.

20 What the Court has done there is ordered that the
21 product-liability legal issue be certified to the Tennessee
22 Supreme Court for a decision on the issue. So, unless the
23 case -- if the JPML transfers the case here, then we're all
24 going to be here in both -- the SSC product-liability issue
25 and the STOPNC product-liability issue will be pending before

1 this Court. If the JPML does not transfer the case here, then
2 in the Middle District of Tennessee, the product-liability
3 issue is going to be going up to the Tennessee Supreme Court
4 and here we're going to have competing motions on the same
5 issue.

6 So, I suppose that once the JPML does what it does,
7 we will have some more guidance, but I wanted to give the
8 Court a little more context to what's happening in the
9 declaratory judgment action.

10 THE COURT: The issue of whether the case will be
11 here or there will be entirely in the hands of the JPML?

12 MR. TARDIO: I haven't seen the motion, but that's
13 what I understand from the --

14 MR. STRANCH: That is correct, your Honor.

15 THE COURT: And what is the view of plaintiffs, that
16 this Court is in a better position than the Tennessee Supreme
17 Court to decide this all?

18 MR. STRANCH: Your Honor, first of all, this is a
19 unique procedure that Tennessee has. The magistrate judge has
20 suggested that we do a certification and ask the District
21 Court to certify to the Supreme Court. So, first, the First
22 Federal District Court will have to --

23 THE COURT: This is the magistrate judge in
24 Tennessee?

25 MR. STRANCH: That is correct.

1 First, the Federal District Court would have to
2 accept the certification and send it to the Supreme Court and
3 then the Supreme Court would have to accept the certification
4 and rule upon it.

5 THE COURT: Now, in Massachusetts that process would
6 take about three years.

7 MR. STRANCH: That's about what it's going to take in
8 Tennessee, your Honor.

9 MR. TARDIO: Well, I don't know that that's the case.

10 MR. STRANCH: I've got one that's been pending
11 waiting for the Supreme Court to rule whether they're going to
12 take it or not for a couple of months, and we don't have a
13 full Tennessee Supreme Court right now. It appears that
14 they're not issuing very many opinions until they get filled
15 back up with new judges. So, it could very well be a very
16 long time before it's decided, and that doesn't even get into
17 the fact that there are factual issues that are not in front
18 of the judge in Tennessee that would need to be put into the
19 record so that it could go up to the Tennessee Supreme Court.
20 This will be a very long process, and that's one of the
21 reasons why we want it here, because the Court already has all
22 the facts --

23 THE COURT: I thought you asked for certification. I
24 thought the plaintiffs asked for certification.

25 MR. STRANCH: We did not ask for certification. We

1 asked that the Court strike it because it's inappropriate to
2 have a court sitting on an insurance coverage dispute case
3 determining what claims plaintiffs can bring not related to
4 the question of whether there's coverage or not.

5 THE COURT: Well, I guess you'll duke it out for a
6 while and then it will come to me or not.

7 MR. STRANCH: That's correct, your Honor.

8 THE COURT: Thank you.

9 MR. TARDIO: Thank you, your Honor.

10 THE COURT: What else?

11 MR. STRANCH: Your Honor, we have one other thing.
12 It's under the briefing in process, but it's not been filed
13 yet.

14 We discovered recently in a deposition of Culclasure
15 that the drug formulary that had been provided to the
16 plaintiffs by the Specialty Surgery Center and Dr. Lister was
17 not actually the drug formulary in effect at the time the
18 shots were given to the plaintiffs and, in fact, Depo Medrol
19 and MPA were not on the drug formulary that was being used by
20 the clinic at the time the shots were given.

21 The changes to that formulary were made in April of
22 2013, long after this became aware of it, long after notice
23 letters had been sent. And so, we've served some discovery to
24 try to figure out why plaintiffs didn't get this information
25 earlier, and to determine whether there is a problem with the

1 document collection and production that's taken place there or
2 what happened.

3 We're going to be filing a motion to ask to re-depose
4 two of the people now that we have this information that we
5 did not have when we deposed them the first time, and then
6 we're also going to be filing a motion asking that the
7 defendants shorten the period of time to respond to our
8 written discovery because it's narrow and laser targeted at
9 this one issue, and we've met and conferred with the
10 defendants about that and they're going to get back to us as
11 to where they stand, but as it sits today, we're going to have
12 to file a motion on it, and we wanted to let you know that
13 that was coming as well.

14 THE COURT: Who are the defendants with respect to
15 this issue?

16 MR. STRANCH: Specialty Surgery Center and Dr.
17 Lister. They're in Tennessee. They're the smaller clinic,
18 you know, in the Cookeville/Cumberland area of Tennessee. Mr.
19 Tardio and his firm also represent that clinic defendant as
20 well.

21 THE COURT: Okay. We can't wait.

22 Is there anything else that anyone has, plaintiff or
23 defendant?

24 (No response.)

25 THE COURT: Well, thank you all. I will see you,

1 then, on November 12th, I think.

2 MS. JOHNSON: Thank you, your Honors.

3 THE COURT: Thank you.

4 (Adjourned, 2:59 p.m.)

5
6 C E R T I F I C A T E

7 I, Catherine A. Handel, Official Court Reporter of the
8 United States District Court, do hereby certify that the
9 foregoing transcript, from Page 1 to Page 45, constitutes to the
10 best of my skill and ability a true and accurate transcription of
11 my stenotype notes taken in the matter of No. 13-md-2419-RWZ, In
12 Re: New England Compounding Pharmacy, Inc., Products Liability
13 Litigation.

14
15 October 28, 2015
16 Date

/s/Catherine A. Handel
Catherine A. Handel RPR-CM, CRR